

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM	DOCKET NO. INU-01-1
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ORDER GRANTING AND DENYING MOTIONS

(Issued December 10, 2001)

On August 9, 2001, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), filed a petition for determination of effective competition and deregulation pursuant to Iowa Code § 476.1D (2001). The Utilities Board (Board) subsequently docketed the matter as a formal notice and comment proceeding and established a procedural schedule.

On November 20, 2001, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion for supplemental counterstatements, alleging that Iowa Telecom failed to submit all of its evidence and argument in its initial statement and instead withheld most of its evidence and argument for its reply statement, effectively denying the other parties a fair opportunity to respond. Consumer Advocate argues that due process requires that the Board permit Consumer Advocate and all participants other than Iowa Telecom to file supplemental counterstatements of position, responding to Iowa Telecom's reply

statement. This would require revising the procedural schedule and delaying the oral presentation in this matter to sometime in January 2002.

On November 21, 2001, the Board issued an order shortening the time for other participants to respond to Consumer Advocate's motion to November 27, 2001.

On November 26, 2001, Iowa Telecom filed a response opposing Consumer Advocate's motion. Iowa Telecom asserts that its counterstatement was merely a reply to the comments of the other participants, permitted by Ordering Clause No. 4.b of the Board's order establishing the procedural schedule in this docket and by the Board's rules regarding counterstatements, see 199 IAC 5.4(2). Iowa Telecom argues its statement responded to pricing issues raised by Consumer Advocate, and these were issues Iowa Telecom could not have reasonably anticipated when it filed its initial statement.

On November 27, 2001, the Iowa Association of Municipal Utilities (IAMU) filed a response in support of Consumer Advocate's motion. IAMU argues that Iowa Telecom's use of its reply statement to submit additional evidence and argument denied IAMU any procedural opportunity to respond and revealed new issues in its proposal, "including whether Iowa Telecom is entitled to complete deregulation even when a CLEC only offers some comparable services, but not others and whether the Board can impose conditions on Iowa Telecom in order to prevent predatory abuses." (IAMU Response at page 1.)

Also on November 27, 2001, the Independent Networks, L.C., Farmers' and Business Mens' Telephone Company, Forest City Telecom, Inc., Lost Nation-Elwood Telephone Company, and Clarence Telephone Company (collectively, the Independent Networks) filed a motion for an order permitting Independent Networks to take the deposition of Iowa Telecom's witnesses and supporting Consumer Advocate's motion.

On December 4, 2001, Independent Networks filed a motion for an order compelling Iowa Telecom to answer a data request submitted to Iowa Telecom by Independent Networks on November 26, 2001, and a motion to continue the hearing in this matter to allow time for depositions. On the same day, IAMU filed a motion for an order compelling Iowa Telecom to respond to six data requests submitted to Iowa Telecom by IAMU on November 28, 2001.

Also on December 4, 2001, Iowa Telecom filed a response to Independent Networks' motion for an order permitting depositions, stating Iowa Telecom does not object to the request to take depositions but is opposed to any changes in the procedural schedule to accommodate the request.

Finally, on December 7, 2001, Independent Networks informed Board staff that it would withdraw its motion for depositions and its motion to compel an answer to a data request, stating that a deposition was held by agreement of the parties on December 6, 2001, and that Iowa Telecom has responded to the data request.

The Board will deny the request for supplemental counterstatements filed by Consumer Advocate and will grant in part and deny in part the motion to compel filed by IAMU.

In its motion for supplemental counterstatements, Consumer Advocate lists two examples of the new allegations and arguments alleged to be improperly included in Iowa Telecom's counterstatement. The first is Iowa Telecom's statement that it cannot change its prices "easily or quickly" because it must file tariffs with the Board. Consumer Advocate argues that Iowa Telecom neglects to mention that Iowa Code § 476.97(11)(e)(4) (2001) gives Iowa Telecom the ability to reduce the price for any basic communications service on one day's notice filed with the Board. The second example cited by Consumer Advocate is Iowa Telecom's statements regarding the Herfindahl-Hirschman Index (HHI); Iowa Telecom quotes a portion of a Board order addressing the HHI in a prior docket, but (according to Consumer Advocate) ignores a subsequent order in the same case also addressing the HHI. Consumer Advocate argues these examples demonstrate the need for supplemental counterstatements by all participants other than Iowa Telecom.

In its response, Iowa Telecom argues that the pricing statement was made in response to Consumer Advocate's initial statement of position, in which Consumer Advocate asserts that if the exchanges were truly competitive then vigorous price competition would already be taking place and to Consumer Advocate's reliance on the HHI in its initial statement.

The Board finds that the examples cited by Consumer Advocate as examples of Iowa Telecom's alleged abuse of the counterstatement are, instead, appropriate responses to issues raised in the initial statements filed by other participants. In those statements, arguments were made that the identified exchanges do not exhibit the expected degree of price competition; Iowa Telecom fairly responded with its explanation of why that has not occurred. Consumer Advocate will have an opportunity to inquire into Iowa Telecom's explanation through cross-examination of Iowa Telecom's witness and to make its arguments in post-hearing briefs, so there is no denial of due process resulting from Iowa Telecom's response to the alleged lack of price competition raised by other parties in the initial statements.

Similarly, in its initial statement Consumer Advocate offered approximately six pages of comment regarding the HHI and its possible application to this case. Iowa Telecom's argument, in its reply statement, regarding Iowa Telecom's understanding of the Board's prior position on the HHI in another case was an appropriate use of the reply statement. Again, Consumer Advocate will have the opportunity to inquire into Iowa Telecom's statements at hearing and will be able to offer argument regarding any other Board orders that may be relevant to the HHI.

Thus, the Board concludes that Iowa Telecom's reply statement was not an abuse of the procedures established for this docket and supplemental reply statements are neither required nor appropriate.

IAMU's motion to compel involves six data requests sent to Iowa Telecom on November 21, 2001, and responded to by Iowa Telecom on November 28, 2001. IAMU argues that Iowa Telecom either failed to answer the data requests or interposed objections that were not competent. IAMU attached the data requests, with Iowa Telecom's responses and IAMU's arguments, to the motion to compel. Iowa Telecom has not responded to IAMU's motion, but with the hearing in this matter scheduled to commence shortly, the Board cannot wait for a response that may never be filed.

The first data request attached to the motion, identified as IAMU data request No. 3, seeks Iowa Telecom's definition of the term "predatory pricing." Iowa Telecom's response consists of a reference to unspecified federal and state court interpretations of federal and state antitrust laws. IAMU argues this answer is a failure to answer because it lacks any specificity. The Board agrees. The statements and counterstatements filed by the participants have identified predatory pricing as a potentially significant issue in this docket, and the Board's understanding of the parties' various positions on the issue will be advanced if it is clear whether the parties agree or disagree on the definition of the term. Iowa Telecom should submit a revised answer to the data request, including a specific definition of the term as used in its statements and the specific source of the definition.

The second data request attached to the motion, identified as IAMU data request No. 4, seeks copies of all correspondence sent by Iowa Telecom to municipal

telecommunications utilities in Iowa since the commencement of this case regarding either (1) possible sale of exchanges by Iowa Telecom or (2) Iowa Telecom's reasons for filing the petition in this docket. Iowa Telecom's answer is that there is no correspondence fitting within the first category and that a copy of Iowa Telecom's notice served on October 1, 2001, was attached to the response. In its motion, IAMU argues that it has knowledge of a letter dated November 7, 2001, from Iowa Telecom to a municipal telecommunications utility providing an update on Iowa Telecom's evaluation of exchange sales and a brief discussion of Iowa Telecom's deregulation filing. The Board will grant the motion to compel with respect to this data request and direct Iowa Telecom to amend its answer to data request No. 4 by providing a copy of the November 7, 2001, letter. The Board will further direct Iowa Telecom to conduct a good faith review of its files for any and all other correspondence that may be responsive to the data request.

The next two data requests attached to the IAMU motion to compel are identified as IAMU data request Nos. 6 and 8. They ask Iowa Telecom to indicate whether Iowa Telecom believes that certain provisions of Iowa Code chapter 476 would continue to apply to Iowa Telecom if its petition in this docket is granted. Iowa Telecom objects that the data requests are unduly burdensome in that they would require Iowa Telecom to engage in legal research for IAMU and they seek a legal opinion, not factual information, and are therefore outside the scope of proper discovery. IAMU argues it is merely inquiring into the potential consequences of

Iowa Telecom's proposed deregulation and the data request is, accordingly, appropriate.

The Board will not grant the motion to compel with respect to data request Nos. 6 and 8 because, as they are framed, they seek legal conclusions. Legal argument is best reserved for the briefs.

The next data request attached to the motion to compel is identified as IAMU data request No. 13. It asks Iowa Telecom to admit or deny a statement regarding the likely response of other companies to the proposed deregulation of Iowa Telecom in the identified exchanges. Iowa Telecom objects that the data request is argumentative, assumes facts not in evidence, and requires that Iowa Telecom speculate regarding the future actions of unspecified competitive local exchange carriers. IAMU argues that data requests are not limited to data and an objection that the request is argumentative is not competent.

The Board agrees that data requests are not necessarily limited to seeking pure data and that the fact that a hypothetical may be argumentative does not mean it is objectionable. However, Iowa Telecom's third objection, that the data request requires speculation regarding the future actions of unknown competitors, is well taken. No admissible, relevant evidence will be produced by such speculation. The request to compel an answer to IAMU data request No. 13 will be denied.

Finally, IAMU data request No. 18 asks Iowa Telecom to assume its petition for deregulation is granted and it then reduces rates for some or all of its retail

services in the deregulated exchanges. The data request then asks how the higher rates for the same services in Iowa Telecom's remaining, regulated exchanges "would not be earning monopoly profits." Iowa Telecom objects that the request is irrelevant. Iowa Telecom argues that the prices it charges in its other exchanges are not before the Board in this proceeding. IAMU argues that the consequences of Iowa Telecom's proposal in this docket are relevant to understanding its impact on the public interest.

The Board agrees that the request is irrelevant, although the Board does not agree with the manner in which Iowa Telecom has described the lack of relevance. The request asks Iowa Telecom to speculate regarding future events and the legal and economic effect of those events. Whatever answer Iowa Telecom might give, it appears it would have no material effect on the Board's decision in this case. Even if Iowa Telecom were to agree that lower prices in (hypothetically) deregulated exchanges would be evidence that its regulated prices are too high, that would not tend to prove or disprove anything regarding the existing level of competition in the nine exchanges at issue. IAMU has not shown how Iowa Telecom's answer to the data request could or would lead to the discovery of admissible, relevant evidence, so the motion to compel an answer to IAMU data request No. 18 will be denied.

IT IS THEREFORE ORDERED:

1. The motion for supplemental reply statements filed on November 20, 2001, by Consumer Advocate is denied.

2. The motion to compel filed on December 4, 2001, by IAMU is granted as to IAMU data request Nos. 3 and 4 and denied with respect to IAMU data request Nos. 6, 8, 13, and 18. Iowa Telecom is directed to respond to IAMU data request Nos. 3 and 4 no later than December 11, 2001.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 10th day of December, 2001.